

International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective

Yvonne Dausab

Introduction

The interconnectedness of human rights is undeniable. That it permeates all spheres of human existence is sacrosanct. Thus, the subjects of human rights are not members of this or that society, but of the community of humankind.¹ The establishment of an international legal order² to regulate state relations and to afford human rights protection to the individual locates itself within the framework of this reality.

When states accede to or ratify international instruments, they make themselves liable to ensure that treaties in general and customary international law³ practices in particular are implemented at municipal level. This obligation is entrenched in most if not all international law instruments and obligations.⁴ States are enjoined to undertake legislative and other measures to ensure the effective implementation of the rights enunciated in the various international instruments that protect and promote human rights. Namibia is known as having ratified a plethora of international human rights and

1 See Vincent (1986:9).

2 Amoo (2008:114) holds that "... international law ... primarily deals with the relations between States. ... The traditional concept is that only States were considered as subjects of international law ... is no longer tenable in the context of contemporary international relations because with the current emphasis on human rights ... international law puts as much emphasis on the rights and obligations of the individual".

3 *Customary international law* in this paper refers to all human rights treaties that have attained the status of universal ratification and, therefore, universal acceptance. Thus, even states that have not ratified a treaty/norm that has attained such status are bound by it. See Viljoen (2007:26).

4 For example, see Article 1 of the African Charter on Human and Peoples' Rights (African Charter); the African Charter on the Rights and Welfare of the Child (African Children's Charter); the Preamble of the Universal Declaration of Human Rights (UDHR); Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); Article 2(2) of the International Covenant on Civil and Political Rights (ICCPR); Article 2(1)(a)–(e) of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); Article 2(a)–(g) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); Article 4 of the Convention on the Rights of the Child (CRC); Article 2(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); Article 3 of the Slavery Convention; Article V of the Convention on the Prevention and Punishment of the Crime of Genocide; and Article 1 of the Rome Statute of the International Criminal Court.

other treaties, but has been short on the effective implementation or even implementation per se of the instruments it has ratified.

Taking its cue from the tone in which Article 144 of the Namibian Constitution was drafted, this contribution questions whether and, if so, to what extent Namibia has remained true to its pledge to implement directly applicable international law within the framework of its municipal legislation. The paper is also an attempt to clarify the interpretation and understanding of Article 144. For the sake of clarity and focus, this contribution will restrict the discussion to the application of the International Covenant on Civil and Political Rights (ICCPR) in Namibia's municipal set-up.

The paper starts off with what other writers have found when they attempted to discuss this provision or the application of international law in Namibia. Secondly, a brief distinction will be drawn between the *monist* and *dualist* approaches. Then Article 144 will be analysed. This will be followed by a discussion on the international human rights normative framework, in terms of its application, implementation and effect. In the final portion of the paper, the application of Article 144 through case law will be sampled, and then some concluding observations will be made.

What do other writers say about Article 144?

A study of other writings on this subject revealed that the domestication of international law into the municipal set-up of a particular country requires the adoption of either a monist or dualist approach. The adopted approach will establish how international law will be introduced into the municipal legal system.

For instance, Viljoen⁵ argues that –

... for the dualists, international law and national law are fundamentally different and therefore domestic law-making is required to 'transform' or 'incorporate' international law into national law.

Monists, on the other hand, perceive that these two legal orders are inextricably linked, and that international law becomes part of national law upon ratification. Viljoen argues, quite convincingly, that this dichotomy is a fallacy and gives rise to a possible third approach, which is the self-executing nature of some treaties such as the Torture Convention.⁶ Viljoen in fact introduces a concept unfamiliar to this debate, namely the *compatibility study*.⁷ In other words, states ought to conduct a process akin to an environmental scan – i.e. a scan of the domestic legal landscape – to see whether the international law they wish to ratify is in fact compatible with the existing national legislation. Clearly, this pre-ratification process is to assist with what needs to be done in order to allow the municipal scene to comply with the requirements of International

5 See Viljoen (2007).

6 See (ibid.:22).

7 See (ibid.:22).

law. Consequently, this third option/approach may even do away with the theoretical differentiations between the two positions.

Horn,⁸ on the other hand states that “the founding fathers and mothers of Namibia made international and human rights law binding upon Namibia, as part of the laws of the country”. According to Horn,⁹ in terms of the provisions of Article 144, all human rights treaties ratified by Namibia apply directly in the Namibian legal system. In other words, no enacting law is necessary to make the United Nations human rights covenants and treaties apply. However, as he quite correctly points out, this supposition is flawed because the enforcement mechanism is not ready to apply the International instrument, i.e. the administration of justice system and the courts are not quite ready to translate it into the domestic system. Horn uses the Torture Convention as a case in point. It is common cause that the prosecutorial authority has often opted to prosecute for assault with intent to do grievous bodily harm – a common law crime and its attendant consequence – instead of prosecuting for torture. However, *torture*, by definition and scope, is much more serious than assault and may sometimes not even involve a physical attack, whereas the common law crime, to constitute the seriousness that it is often associated with it, requires the physical element. The two, he argues, are totally different. Therefore, to render the Torture Convention applicable/more effective in Namibia as well as the resolution of dealing with torture in the way it is defined in the Torture Convention may require separate legislation to be more effective.

Horn makes another startling revelation: the jurisprudence of Namibian courts shows that international human rights treaties have no effect on our municipal processes.¹⁰ The sufficiency of Article 144 as the norm for domesticating international law is, therefore, called into question.

Contributing to this debate, Bangamwabo¹¹ puts forth that there are only two ways through which states can comply with their international legal obligations contained in treaties:

- By observing or respecting their national laws (the constitution and/or the existing statute laws) that are consistent with international norms, and
- By making those international norms or obligations part of the national legal or political order, in other words, domesticating and/or internalising them.

8 Horn (2008:142).

9 (ibid.).

10 See Horn (2008:144, footnote 292): “A case in point is the now well-known Frank case. The HRC, the treaty body of the ICCPR, and other treaty bodies have given several advisory opinions on the meaning of the word sex as category for protection. Almost without exception [this] included sexual orientation as a category. However, the Namibian Supreme Court opted to ignore the jurisprudence of international human rights law and followed the narrow interpretation of the Zimbabwean courts, defining sex as a category as ‘men and women’”. See *The Chairperson of the Immigration Selection Board v Frank & Another*, 2001 NR 107(SC).

11 Bangamwabo (2008:166–167).

He further argues that these two systems of law – international vis-à-vis national – should be seen for what they really are: as serving two different interests. International law primarily focuses on states, whereas national law is about the relationships among persons within national jurisdictions. Nonetheless, there has recently been a confluence of interest such that both systems are now interested in the well-being of the individual. It is this part of Bangamwabo's contribution that is most relevant for the purposes of concluding whether Article 144 has fulfilled its object to ensure the effective domestication of international law.

A further view on Article 144 is quite succinctly postulated by Tshosa,¹² who states that Namibia has a positive relationship with international law. He uses examples of constitutional provisions on foreign relations, foreign investments and, more pertinently, Article 144 to buttress this point. He argues that this positive relationship could very well be informed by Namibia's history of apartheid, which made it necessary to anchor the future firmly on principles of international law.¹³

The founding fathers of the Constitution felt that the intent to introduce the minimum democratic values in the territory long denied by the South African apartheid regime to the great majority of the Namibian people did not stop at the country's national boundaries, but were to be extended to Namibia's international conduct – hence the proclaimed adherence of the newly constituted Namibian state to the general standards of behaviour agreed upon by the vast majority of members of the international community.

Notable about Tshosa's views on Article 144 is that he identifies two exceptions to the general rule that international law automatically applies to Namibian law, namely constitutional supremacy, and legislative authority. In other words, international law that is in conflict with the provisions of the Namibian Constitution cannot apply; also, an Act of Parliament can specifically exclude the operation of international law in Namibia. Whilst one may not necessarily agree with the views and interpretations accorded to these concepts within the meaning of Article 144,¹⁴ Tshosa's views in this regard are valuable.¹⁵

The above background set the scene for the discussion of whether or not Article 144 has, over the past 20 years, succeeded in its objective to internalise¹⁶ international law. In order to contextualise this debate, it is necessary to establish the approach with which Namibia identifies itself, albeit only in theory, as regards the relationship between International law and national law.

12 See Tshosa (2010:22–25).

13 (ibid.:10).

14 See e.g. discussion under the section entitled “What is the meaning of Article 144?” later herein.

15 For more on the views expressed regarding constitutional supremacy and legislative authority, see Tshosa (2010:22–25).

16 See Viljoen (2007:5, 23): “The greatest challenge is to bring about compliance with the treaty provisions by government officials and nationals alike. International legal norms only become truly effective if compliance is not motivated by coercion or self-interest, but flows from personal motivation brought about by an internal process of norm-acceptance”.

The distinction between *monist* and *dualist* approaches: The Namibian context

More recently, it has become increasingly difficult to maintain the distinction between *monist* and *dualist* approaches in classifying the positions of states in terms of how they apply international law to their municipal set-up. In fact, making this distinction has become almost nugatory, as there is a move towards accepting that the two approaches are simply processes that lead to a similar result in terms of whether –

- one requires enabling legislation
- the international treaty is self-executing, or
- upon its ratification and entry into force, it is incorporated directly into municipal law.

It has become a matter of whether or not the particular treaty that requires implementation is considered part of customary international law *jus cogens*¹⁷ or obligations *erga omnes*.¹⁸ International law instruments that are regarded as practices or instruments that have attained the status of customary international law are applicable to all countries the world over, whether a country has ratified such an instrument or not. Therefore, the issue of the monism or dualism of a country's domestic system does not arise. Still, the slight distinction between *monism* and *dualism*, conceptually at least, has been the subject of much writing and, for the purposes of this contribution, deserves some elucidation.

The postulate is that *monism* means that international and national law are seen as one legal system. In other words, there is no need for any enabling domestic legislation. Once a state has ratified a particular treaty, it is assumed that such treaty now forms part of that country's national legal system and is subject to the enforcement mechanisms of that system. Thus, citizens can approach the courts and the law enforcement agents to assert their rights and receive protection under the treaty concerned by using the domestic systems of enforcement. Proponents of this theory assert for good reason that international law rules supreme¹⁹ over national law. In other words, should the international law offer better protection to the citizens who are the apparent beneficiaries of the system, such law must be applied. At the very least, applying the monist view literally may clash with the general tenets of state sovereignty in that states will be required to comply regardless of what their own position of law and the Constitution will be, given that they have ratified the treaty. This approach will most certainly also erode the underlying complementary nature of the relationship between the two legal orders in that it places international law above national law in the likely event of a conflict between the two systems.

17 See Article 53 of the Vienna Declaration on the Law of Treaties (Vienna Declaration), which provides that “a peremptory norm of general international law is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”.

18 See Viljoen (2007:28): “Peremptory norms (*jus cogens*) largely overlap with obligations *erga omnes* and non-derogable rights – these are obligations that are owed to the international community as a whole, such as protection from slavery”.

19 Brownlie (2003:32).

Dualism, on the other hand, means the two systems are different. Thus, in order for international law to be accepted at national level, it has to be ‘translated’ by way of domestic legislation. This has the net result that, without domestication, international law has no force or effect in such a country – which, given the principles of customary international law, is almost impossible. This is because practices and norms that have attained the status of customary international law bind states irrespective of whether or not they have ratified or domesticated such laws. All states are consequently bound by what the international community requires in terms of compliance with such treaties and conventions.²⁰ Equally, the total or partial disregard for rules of public international law in the processes of the nation has the effect that such disregard will make the entire international system of protection and advancement of human rights pointless. In the end, it is a question of commitment – compliance²¹ – and the political will of a state to ensure that its citizens enjoy optimum protection of their rights in tandem with the tone and spirit of what international law wishes to achieve, namely the inherent dignity and inalienable and equal rights of all members of the human family.²²

Applying the literal interpretation of the two approaches of International human rights protection to the municipal scene, Namibia belongs to the species of monist states. This is evident from the wording and tone of Article 144 of its Constitution. It is a well-established fact that the national level is best positioned to implement international standards because of its proximity to the people and the enforcement mechanisms that are in place. At the very least, states have –

- a constitutionally entrenched separation of powers
- an independent judiciary and functional court system, and
- an established rule-of-law culture and enforcement agents such as the police, the prosecuting office, and a prison service.

Monists claim that there is no need for further enabling legislation when applying international law to the domestic legal scenario. This means when Namibia ratifies an international instrument, the enforcement machinery of the Namibian legal system such as the courts and the police are available to ensure there is compliance with that Instrument. On the surface, this is supposed to be the position in Namibia. In fact, arguing differently will result in making Namibia’s implementation approach of international law a dualist one – and this will fly in the face of reaffirming the manifest intent of the legislator, which was to make sure international law becomes part of Namibian law once ratified. But is it possible that, whilst the legislative intent of what Article 144 was to achieve was monism, the pace of implementation has conformed to the dualist approach? In fact, the attitude of courts, when they consider international human rights treaties as part of developing their jurisprudence, leaves much to be desired. A more elaborate discussion on the role of the courts in developing an international-law-friendly jurisprudence follows in the succeeding portions of the contribution below.

20 See Viljoen (2007:26) for a more elaborate discussion of this principle.

21 (ibid.).

22 See the first paragraph of the Preamble to the 1948 Universal Declaration of Human Rights.

What is the meaning of Article 144?

Article 144 of the Namibian Constitution states that –

[u]nless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

Firstly, in its current form, the Constitution provides that international instruments binding on Namibia, through ratification, become part of Namibian law. In terms of Article 32, the President has the power to “negotiate and sign international agreements, and to delegate such power”.²³ In addition, the National Assembly, as the principal legislative authority, has the power and function to “agree to the ratification of or accession to international agreements which have been negotiated and signed in terms of Article 32(3)(e)”.²⁴ The caveat to these broad powers and functions to ratify international instruments lies in the fact that it is subject to the overriding terms of the Constitution and laws of Namibia.²⁵ The aspirations enunciated in the Preamble and the catalogue of basic human rights protected in Chapter 3 should, therefore, be used as the guiding provisions to determine whether or not a particular international instrument ought to be considered part of Namibian law. Evidently, this line of argument is problematic, as Namibia then has scope to either withdraw or disregard the provisions of international law they do not wish to comply with. This they will have to do by either –

- amending the Constitution²⁶ to make international law subject to the limitation clause, similar to what would be the position for municipal laws of general and other application, or
- by enacting a law specifically excluding either a particular provision in the international law or the international law in its entirety.

Moreover, Namibia has an opportunity in the international arena to limit the application of a treaty at domestic level. This can be done through the system of reservations, which allows a country that has ratified a treaty to exclude certain portions of the treaty from applying in such country. Another option is to simply not ratify or accede to a particular human rights treaty.

Further to the options stated above, and in the unlikely event that an international law provision is not consistent with the Namibian Constitution, the particular international instrument will not be binding. In other words, unless such a provision is part of the body of customary international law practices and principles – which are in any

23 See Article 32(3)(e), Namibian Constitution.

24 (ibid.:Article 63(2)(e)). Article 32 sets out the functions, powers and duties of the President as the Head of State.

25 See Articles 1(6) and 32(1). Not only is the Constitution the Supreme Law, the President also has the primary responsibility to uphold and protect the Constitution: “...the President shall uphold, protect and defend the Constitution as the Supreme Law ... which he or she is constitutionally obliged to protect, to administer and to execute”.

26 See Article 132, Namibian Constitution.

event applicable to all nations regardless of whether they have signed or ratified such instruments – such international law will be of no force or effect.

Additionally, Parliament, as the principal legislator,²⁷ may, by way of an Act of Parliament, not make international law part of Namibian law. The exclusion of international law using an Act of Parliament is, of course, not recommended, although there is provision for such possibility in the Article dealing with international law. It is understandable, however, that the Namibian Parliament is likely to exclude an international agreement that is not consonant with the spirit and tenor of the Namibian Constitution if it was entered into by the pre-Independence apartheid administration and conflicts with Namibia's current environment.²⁸

The principle of *pacta sunt servanda*²⁹ requires of states to perform every treaty binding on them in good faith.³⁰ Thus, the treaty agreement they enter into has to be respected.³¹ It is an established practice and norm of customary international law that a state, as part of the international community, is obliged not to undermine the object and purpose of the treaty it has signed and ratified. The effect of this is that the municipal environment has to comply with the requirements of the international law.³² Even so, the principal legislator has a primary obligation to use its powers to legislate subject to the Constitution, but also in the interest of the people and for peace, order and good government.³³

The second portion of Article 144 states that rules of international law, once binding, become part of Namibian law. The Oxford Dictionary meaning of *binding* is “placing a legal obligation”, and it describes “an agreement or promise that must be carried out or obeyed”. Thus, a state is bound by the terms and provisions of international law once it signs and ratifies it.³⁴ Namibia is bound in terms of each international instrument

27 See Article 44 (*ibid.*), which provides that the “legislative power of Namibia shall be vested in the National Assembly with the power to pass laws with the assent of the President”.

28 See Article 63(2)(d) (*ibid.*), in terms of which the National Assembly has the power and function, subject to the Constitution, “to consider and decide whether or not to succeed to such international agreements as may have been entered into prior to Independence by administrations within Namibia in which the majority of the Namibian people have historically not enjoyed democratic representation and participation”.

29 As at 17 February 2010, Namibia had not yet acceded to the 1969 Vienna Convention on the Law of Treaties. Nonetheless, this Convention is binding on Namibia, as it is the customary international law on treaties; see Article 26, Vienna Convention. See also Aust (2007:79).

30 In terms of Article 27 of the Vienna Convention, read with Article 46.

31 See Viljoen (2007:22).

32 Bayefsky (2002:4) describes the effect of a treaty as follows: “In the case of international human rights treaties, this means that states parties undertake to ensure that their own national legislation, policies or practices meet the requirements of the treaty and are consistent with its human rights standards”.

33 See Article 63(1), Namibian Constitution.

34 In terms of Article 2(b) of the Vienna Convention, “ratification”, “acceptance”, “approval” and “accession” mean, in each case, the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty; see also Article 11 (*ibid.*). In [Continued overleaf]

it has ratified by having become a party,³⁵ through any of the means provided for, to accept the terms and conditions of the international community in respect of specific treaty requirements or treaties of a customary international law nature. Furthermore, this provision should often be read in tandem with Articles 5³⁶ and 25³⁷ of the Namibian Constitution, because they are the apparent pillars of effective implementation of human rights issues in this country. This is because they set out the requirements in terms of who is liable for protection and enforcement, but they also set out what happens if an action or law is not in compliance with the Constitution. To this end, Article 25 states the following:

... any law or action in contravention thereof shall to the extent of the contravention be invalid: provided that: (a) a competent Court, instead of declaring such law or action to be invalid, shall have the power and the discretion in an appropriate case to allow Parliament, ... to correct any defect in the impugned law or action ...

It is clear from a holistic reading of the provisions in Article 25 that the position of international law was not envisioned. Hence, international law will only become applicable when it is referred to within the context of Article 144, and by reference to a relevant case or matter where a person was aggrieved.

The third aspect of this provision relates to a definition of the law of Namibia. In its current form, Namibian law consists of a supreme Constitution,³⁸ Roman–Dutch law (which is our common law³⁹), certain pre-Independence South African statute law (which, in terms of our Constitution, remains in force until repealed, amended by an Act of Parliament, or declared unconstitutional by a competent court),⁴⁰ and, over the past 20 years, Namibia’s own jurisprudence and legislative framework, which includes customary law. In this regard it is pertinent to note that, in terms of Article 66 of the Constitution, –

addition, Bayefsky (2002:4–5) states that “a state party will become bound by obligations under the treaty ... on the date the treaty enters into force and the date the treaty enters into force for the particular state”; arguably this entry into force is through ratification or accession.

35 A *party* means a state which has consented to be bound by the treaty and for which the treaty is in force; see Article 2(g), Vienna Convention.

36 Article 5 states that “... rights and freedoms ... shall be respected and upheld by the Executive, Legislature and Judiciary ... and shall be enforceable by the Courts”.

37 “(1) Save in so far as it may be authorised to do so by this Constitution, Parliament ... shall not make any law ... which abolishes or abridges the fundamental rights and freedoms conferred by this Chapter

(2) Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom”.

38 Article 1(6) of the Namibian Constitution provides that “This Constitution is the Supreme Law of Namibia”.

39 See a full discussion of the nature of common law in Amoo (2008:62–77).

40 Article 140(1) of the Namibian Constitution states that “[s]ubject to the provisions of this Constitution, all laws which were in force immediately before the date of Independence shall remain in force until repealed or amended by an Act of Parliament or until they are declared unconstitutional by a competent Court”.

[b]oth the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

The remaining sources of law in Namibia are case law and juristic writings.⁴¹

Indigenous juristic writings are currently almost non-existent in the Namibian context, but they play an important role⁴² because, in addition to other sources, they are the ones from which the country creates its corpus of laws. It is this set of laws of which international law will become a part.

Firstly, therefore, international law is considered to be an integral source of Namibian law; and secondly, it means that, once a violation covered by international law occurs in Namibia, the aggrieved party can attend on the local court for relief. In this sense, the court will be required to apply the international law in question in order to grant the relief sought, and not just take judicial notice of the relevance or not of such international law.

The international human rights normative framework

When states agree to establish a public international legal order to regulate their external conduct with each other, they consent to a breach of their national boundaries. With globalisation increasingly shrinking the boundaries of human existence, international law has made it virtually impossible for states to cling to their territorial integrity and sovereignty when it comes to whether or not human rights have been violated.⁴³ Accordingly, international law has developed and currently maintains a reasonably solid place in the society of nations and how they interact with each other.⁴⁴ Whilst International law has not replaced the significant role national law plays in the promotion and protection of the rights and welfare of its people, international law does support that role. In some instances, international law even plays the role of Superior Protector of people's rights at a domestic level. Nonetheless, international law is vulnerable: firstly, its effectiveness is dependent on the political will of States to be bound by it. Secondly, it requires a 'buy-in' from the members of society to ensure they are active participants in the implementation of international law at domestic level.⁴⁵

41 See Amoo (2008:106–111).

42 (ibid.).

43 See Viljoen (2007:17): "Although the UN is based on principles of the 'sovereign equality of all its members' and 'non-interference in the domestic affairs', over the last decade the absolute nature of sovereignty has been eroded, especially through the working of international human rights law".

44 See Aust (2007:3).

45 (ibid.). See also Amoo (2008:110): "Some writers, notably Austin, Hobbes and Hart, have raised fundamental theoretical questions relating to the legal character of international law. They have argued that international law is not true law but a code of rules of conduct of moral force only. Their argument is premised on the fact that there is no effective machinery for enforcing the rules of international law. Their observance ... seems to depend on international comity or fear of retaliation".

In order to properly locate the place of international law in the Namibian domestic set-up, the ICCPR and its attendant Protocols will be illustratively used to establish the value of Article 144 in the implementation of international law in Namibia. This will be juxtaposed with other rudimentary text of the body of international law.

The Charter of the United Nations

This Charter was the *raison d'être* of the United Nations (UN), and remains the foundational truth of its member states. The Charter sets out the background to the establishment of the UN, notably to –⁴⁶

... save succeeding generations from the scourge of war, which twice in a lifetime has brought untold sorrow to mankind and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person ... and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained.

In broad terms, Article 1 captures the UN's purpose as the maintenance of international peace and security, development of friendly relations among nations, and cooperation in the resolution of international issues. All member states are enjoined to fulfil their obligation under the Charter in good faith and for the benefit of those for whom the Charter is meant.⁴⁷

Vienna Convention on the Law of Treaties

The Vienna Convention sets out the essential content and effects of customary international law on treaties between states. Most states, whether they are party to the Convention or not, recognise it as the pre-eminent "treaty of treaties".⁴⁸ This is important to note, as Namibia is conspicuously absent from the list of states that have signed, ratified, acceded to, or succeeded to the Convention.⁴⁹ Nonetheless, it is argued here that the Convention's provisions apply to Namibia as though the country had ratified the treaty because of the customary international character of the Convention's application to nations. Its preambular provisions essentially capture the guiding principles of the Convention, in recognising –

46 See UN (1945:3).

47 See Article 2 of the UN Charter, which provides that members are to act in accordance with the following principles, amongst others in that Article: The UN is based on the principle of the sovereign equality of all its members; that all members are to fulfil their obligations under the Charter in good faith; that they are to settle their international disputes by peaceful means; that all members refrain from the threat or use of force against the territorial integrity or political independence of any state; that they are to give every assistance to the UN in any action it takes in accordance with the Charter; and that the UN is not authorised to intervene in matters that are essentially domestic, although this principle is not to prejudice the application of enforcement measures under Chapter VII.

48 See http://untreaty.un.org/ilc/summaries/1_1.htm; last accessed 18 February 2010.

49 See http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~...; last accessed 18 February 2010, status as at 17 February 2010.

... the ever increasing importance of treaties as a source of international law and as a means of developing peaceful cooperation among nations, whatever their constitutional and social systems.

Namibia has assented to a plethora of international instruments, each of which carries an inherent obligation on the state to ensure domestication of the international law in question. The Vienna Convention assists states in measuring up to this obligation and provides basic guidelines on the interpretation,⁵⁰ implementation, and application of the international law to the municipal legal framework.⁵¹ For our purposes here, two aspects of international law remain controversial, however, namely the provision of reservations,⁵² and the violation of international law in preference to domestic law. These are concepts that have led to the lack of effective implementation of international law at municipal level. The latter aspect has enjoyed some degree of debate in the Article 144 question of the Namibian Constitution and, therefore, will receive some attention in this contribution.

The International Covenant on Civil and Political Rights

The ICCPR⁵³ is part of the International Bill of Human Rights.⁵⁴ As such, it constitutes an important component of the international human rights protection system. The Universal Declaration of Human Rights enumerated a catalogue of general principles anchored on justice, peace and freedom. The adoption and subsequent entry into force of the ICCPR was a legal manifestation of these ideals and broad declarations of intent.⁵⁵ It is an open secret that, in some corners, the indivisible, interdependent and interrelated nature of human rights remains a fallacy. This is so because constitutions of many countries, including Namibia's, still make the enforcement of 'socio-economic rights' subject to

50 See Article 31, Vienna Convention, which states that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of the its object and purpose".

51 (ibid.:Article 43).

52 (ibid.:Articles 19–23). See also Denmark's objection to reservations made by Guatemala upon the ratification of a law of treaties. These reservations refer to general rules of the Convention, many of which are solidly based on customary international law. A reservation – if accepted – could call into question well-established and universally accepted norms. The Danish government opine that the reservations are not compatible with the object and purpose of the Convention. "It is in the common interest of States that treaties to which they have chosen to become parties are respected, as to their object and purpose, by all Parties and that States are prepared to undertake any legislative changes necessary to comply with their obligations under the treaties". See Vienna Convention on the Law of Treaties.

53 Adopted and opened for signature, ratification and accession on 16 December 1966, but only entered into force on 23 March 1976. See UN (2002:17).

54 The others are the Universal Declaration of Human Rights (1948), the ICESCR (1966), the First Optional Protocol to the ICCPR, and the Second Optional Protocol to the ICCPR.

55 See paragraph 3 of the Preamble to the ICCPR, which states that "in accordance with the [Universal Declaration of Human Rights], the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his ... civil and political rights".

availability of funds,⁵⁶ and often these rights are not part of a mainstream bill of rights that are usually enforceable through the courts. This makes enforcement of socio-economic rights dependent on rather than interdependent with the other set of civil political rights.

It requires ingenuity on the part of the human rights lawyer to use civil political rights such as the right to life to secure rights of livelihood. Arguably, civil and political rights generally enjoy optimal protection because they do not require resources to implement. These rights require states to simply refrain from violating rights rather than the positive duty imposed by the so-called second-generation rights.⁵⁷ Nonetheless, despite their resource and other limitations states have an obligation to comply with their human rights obligations.

Article 2(2) of the ICCPR requires the following from states:

Where not already provided for by existing legislative or other measures each State party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such legislative and other measures as may be necessary to give effect to the rights recognised in the present Covenant.

Namibia is a signatory to the ICCPR and its Optional Protocol⁵⁸ and is, therefore, bound by its terms. Similar to Article 25(1) of the Namibian Constitution, Article 5 of the ICCPR implores states not to interpret or undertake any activity that will disadvantage the beneficiaries under the Covenant. Namibia is not known for making reservations, but our courts have been known for both accepting the ICCPR's principles for purposes of interpretation, and making the Covenant apply in the real sense.⁵⁹ So, in Namibia, whilst there may be instances of violations of human rights such as limitations on freedom of information and political activity, there is a general commitment to protect and advance human rights as stipulated in the Namibian Constitution. The content of the Bill of Rights in the Namibian Constitution is similar to those in the ICCPR.⁶⁰

56 In terms of the Namibian Constitution, socio-economic rights are provided for under the "Principles of State Policy"; see Article 95. See also Article 101, which provides that "[t]he principles of state policy contained in this chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them". See also *Government of the Republic of Namibia & Others v Mwilima & Others SA 29/2001*(unreported citation).

57 *Second-generation rights*, as they are referred to traditionally, are rights that focus on the equality and dignity of the person. They are developmentally and economically oriented. According to Nakuta (2008:89), "ESC [economic, social and cultural] rights are the sine qua non for improving people's lives and standard of living".

58 See Volodin (2008:21) and Viljoen (2007:147).

59 See discussion of the *Mwilima* decision below.

60 See Chapter 3 of Namibian Constitution, Articles 5–25. Also see Naldi (1995:10): "The constitution reflects the 1982 Constitutional principles which were themselves inspired by democratic values and a concern for fundamental rights derived from international standards that provide a context within which the Namibian Constitution should be interpreted and applied".

The Human Rights Committee

The Human Rights Committee is the monitoring body established in terms of Article 28(1) of the ICCPR. It is primarily responsible for the receipt and consideration of state reports.⁶¹ In terms of Article 41 of the Covenant, the Committee is also permitted to receive and consider interstate communications if a declaration has been made by the states concerned to accept the Committee's jurisdiction. More importantly, and as provided for under the Optional Protocol to the ICCPR, the Committee can also accept communications from individuals claiming to be victims of violations of any rights set forth in the Covenant,⁶² provided the state allegedly guilty of the violation has ratified the Optional Protocol. The Committee's methodology is to provide concluding observations on reports, make general comments, and develop jurisprudence based on its interpretation of the Covenant provisions. When Namibia submitted its first state report and, later, when two cases⁶³ were submitted under the Optional Protocol, the country was subject to the Committee's scrutiny.

In 2004, Namibia's initial report was presented to the Committee in accordance with Article 40 of the ICCPR,⁶⁴ albeit some eight years after the report was due. The Committee's comments on it included some positive observations, notably that the death penalty had been abolished, that democratic institutions had been established,⁶⁵ and that international law had been transformed into municipal law in a commendable manner. However, the Committee was concerned about the practical effect of Article 144 of the Namibian Constitution, stating that "Article 144 of the Namibian Constitution may negatively affect the implementation of the Covenant at the domestic level". The Committee did not elaborate on what it meant by this observation, but one can safely argue that it possibly referred to Parliament being potentially able to override the provisions of the Covenant if they were in violation of what was perceived to be reasonably justified municipal legislation that was itself not in violation of the Constitution.

The Committee also recommended that torture should be made a domestic-statute-specific crime because the current position, as previously stated herein, is wholly inadequate in terms of addressing the full effects of the crime of torture.⁶⁶ The second periodic report

61 In terms of Article 40 of the ICCPR, states parties undertake to submit reports on the measures they have adopted that give effect to the rights recognised in the Covenant.

62 The Optional Protocol to the ICCPR, adopted on 16 December 1966, entered into force on 23 March 1976. See Article 1.

63 The two cases are discussed in detail in the latter part of the contribution.

64 For the full report, see <http://www1.umn.edu/humanrts/hrcommittee/namibia2004.html>; last accessed 19 February 2010. The Committee considered Namibia's initial report (CCPR/C/NAM/2003/10) at its 2200th, 2201st and 222nd meetings held from 14 to 15 July 2004, and adopted concluding observations at its 2216th meeting on 26 July 2004.

65 See Articles 1(2), 89, 128, 129 of the Namibian Constitution.

66 Namibia's Initial Report, CCPR/C/NAM/2003/10; see para. 11 under "Principal subjects of concern and recommendations"; <http://www1.umn.edu/humanrts/hrcommittee/namibia2004.html>; last accessed 19 February 2010.

was due on 1 August 2008. It would appear this report is still outstanding, and there is no indication whether any of the Committee's recommendations have been implemented.⁶⁷

State reporting is a state's primary duty.⁶⁸ This is the mirror (albeit sometimes lopsided) reflecting the human rights state of the nation. It is a tool used for accountability. It is also the platform created for states to declare whether or not the Covenant has been implemented in their respective countries effectively. The report also presents an opportunity for both the state and the Committee to assess the extent to which violations occur, and whether these would require external intervention.⁶⁹ In other words, there is a need for a special report and/or a rapporteur to monitor the conditions in a country more closely. And finally, the Committee's observations are stepping stones towards improving the human rights situation and/or implementing the treaty at national level.

Another significant role the Committee plays in developing tools to apply and monitor the effective implementation of the ICCPR is to make general comments on the understanding of the Covenant's provisions. Through this process, the Committee interprets and clarifies the Covenant's meaning. For example, in its General Comment 31,⁷⁰ the Committee quite extensively set out the broad principles that guide Article 2 of the Covenant. More pertinently, the Committee said that states parties are prevented from invoking provisions of a constitution or other aspects of domestic law to justify a failure to perform or give effect to obligations under the treaty.⁷¹ Namibia may be liable on this score in the *Müller and Engelhard v Namibia* Communication.

This provision not only caters for the interest of the beneficiaries, but also has an effect on state relations. This is because international law flourishes under the precondition that each member state has to comply with its obligations and that non-compliance is a total disregard of the essential purpose of international law, namely to "realize the political values, interests, and preferences of various international actors. But it also appears as a standard of criticism and means of controlling those in powerful positions".⁷²

From a reading of various general comments offered by the Committee, one finds that the obligations of states to comply with and implement international instruments in

67 (ibid.:paras 23, 24): "The state party should pay particular attention to providing practical information on the implementation of legal standards existing in the country. Also the state party should provide information within one year, on its response to the Committee's recommendations".

68 See Viljoen (2007:104).

69 (ibid.:105): "It is significant that ... states submit themselves to international scrutiny. Viewed in the context of democratization, the reporting obligation takes on a new meaning, and becomes a vehicle for establishing and guarding democratic institutions".

70 *Human Rights Committee, General Comment 31. Nature of the General Legal Obligation on States Parties to the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.13 (2004). Available at <http://www1.umn.edu/humanrts/gencomm/hrcom31.htm>; last accessed on 19 February 2010.

71 *Communication No. 919/2000*, UN Doc. CCPR/C/74/D/919/2000(2002). Also see *Müller v President of the Republic of Namibia & Another* 1999 NR 190 (SC).

72 See Evans (2006:57).

general is clearly set out in the various treaty obligations. It is equally evident that, in most instances, states do not comply with their obligations under international law. This makes one ask what the problem might be: is it the nature of international law? Is international law toothless?⁷³ The effectiveness and implementation of international law is mostly visible at municipal level: once it is demonstrably applied at that level, it becomes easy to translate its effectiveness on the international platform. The one visible way to illustrate the implementation of international law at municipal level is through the work of competent courts. It is to this which we now turn.

The application of Article 144 through case law

Over a period of 20 years, Namibia has developed and enjoyed constitutional democracy.⁷⁴ The promotion and protection of human rights within this type of culture is the embodiment of respect for the rule of law, justice, and the supremacy of the Constitution.⁷⁵ Given its constitutional history, has Namibia been true to the effective application of Article 144? Have the courts been candid in their application of international law to domestic disputes?

Namibian courts have generally been known for interpreting the Constitution broadly and in a purposeful fashion,⁷⁶ as they are called upon to exercise a value judgment that will provide optimal protection for the individual. This approach to interpreting the Constitution is informed by the values and aspirations of the Namibian people. As a result, courts have generally been reluctant to apply international law directly, especially when it appears to conflict with longstanding practice or tradition in the country. Nonetheless, in the majority of cases, the approach has been to refer to international law and positions in other jurisdictions as guiding examples with persuasive value when courts are called upon to interpret the Namibian Constitution.

A few cases will now be offered to illustrate the approach and attitude Namibian courts have taken when referring either to international law or to examples in comparative jurisdictions in order to support the argument put forward by either party. A brief background will be given for the sample cases, and the manner in which international law and/or comparative case law was regarded by the courts in each case will be indicated. There will be no in-depth discussion of the cases, however.

73 See Aust (2007:2–5) for a fuller discussion of the nature of international law.

74 See Naldi (1995:13).

75 In terms of its Article 1(6), the Constitution is the Supreme Law of Namibia.

76 See *Republic of Namibia & Another v Cultura* 2000 1993 NR (SC) at 340 B–D, where the late Chief Justice Mahomed stated that “a constitution is an organic instrument. ... It must be broadly, liberally, and purposively interpreted so as to avoid the ‘austerity of tabulated legalism’ and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation”.

Minister of Defence v Mwandinghi⁷⁷

This case involved Mr M who was shot and seriously injured by members of the South African Defence Force. He sued them for damages prior to Independence in 1990, but the matter was still ongoing after that date. Essentially, the appeal from the High Court to the Supreme Court was against the substitution of the South African Minister of Defence with his Namibian counterpart in light of the provisions of Article 140(3) read with Article 140(1) of the Constitution. After what appeared to be a full consideration of what counsel had argued and in response to the various authorities they had cited, the court had the following to say:⁷⁸

The Namibian Constitution has a Declaration of Fundamental Human Rights and Freedoms which must be protected. These freedoms and rights are framed in a broad and ample style and are international in character. In their interpretation they call for the application of international human rights norms.

Counsel also made quite extensive reference to principles enunciated in international law and other jurisdictions to support the case they were making. For example, Mr Maritz submitted that –

... Article 145(1)(b) was relevant to the interpretation of Article 140(1) and (3) in so far as a law purports to impose an obligation on the Namibian Government which international law (including the general principles of public international law and international agreements binding upon Namibia referred to in Article 144) recognises as being binding.

It is not immediately clear from the end result of the judgment how much weight was accorded to these submissions and the references that were made to international law. At the very least it is expected that some judicial notice was taken of these observations.

Government of the Republic of Namibia & Another v Cultura 2000 & Another⁷⁹

In this matter, the government, on account of the provisions of Article 140(3) of the Constitution, enacted the State Repudiation (Cultura 2000) Act⁸⁰ against the establishment and workings of Cultura 2000. In particular, and with this piece of legislation, government did not want to recognise or honour obligations that the previous administration had entered into with Cultura. The organisation was established to preserve and promote the cultural practices of Namibians of European descent, e.g. namely those with an Afrikaans, English, German or Portuguese background. The essence of the dispute was anchored on the insidious objective of a N\$4-million loan converted into a donation just three weeks before Independence, and the incumbent government's decision to repudiate the

77 1993 NR 63 (SC).

78 (ibid.:70B).

79 1993 NR 328 (SC).

80 No. 32 of 1991.

aforesaid donation and all its attendant consequences – an act conceived as a violation of a number of rights provided for in the Constitution, e.g. the right to property and culture.

In response to a submission from Cultura 2000 and in support of declaring the activities of an apartheid South Africa as unwanted within the ambit of the principles of international law, the court expressed itself as follows:⁸¹

It is manifest from these and other provisions that the constitutional jurisprudence of a free and independent Namibia is premised on the values of the broad and universalist human rights culture which has begun to emerge in substantial areas of the world in recent times and that based on a total repudiation of the policies of apartheid which had for so long dominated law making and practice during the administration of Namibia by the Republic of South Africa.

This case also referred to Article 144 of the Constitution in specific terms. Its relationship with Article 145, which deals with the Namibian government's obligations "to any other State which would not otherwise have existed under international law",⁸² was also aptly postulated, as follows:⁸³

Clearly many of the laws enacted by the South African Government during its administration of Namibia and many acts performed by that administration during that time were plainly inconsistent with both the ethos and the express provisions of the new Constitution and therefore unacceptable to the new Namibia.

It is hoped that in its effort to "broadly, liberally and purposively interpret the Constitution", the court does effectively consider the principles set out in international law. The uncertainty as to whether or not courts apply the principles they are referred to by counsel comes from the glaring absence at and after judgment of how these principles have influenced the decision. It is possible that they may actually consider such references without necessarily verbalising their use or stating how they apply in the final analysis. The fact that some cases contain quite extensive reference in comparison to others may indicate that they are taking judicial notice, but it is by no means a reflection that international law was used to provide the remedy in this case.

Kauesa v Minister of Home Affairs & Others⁸⁴

The first landmark decision on freedom of expression and speech was set out in *Kauesa*. In this case, courts expressed the overall objective of why they were obliged to consider international law, i.e. to "derive some assistance in the interpretation". This response is not the one expected, namely that the obligation to consider international law derives from the provisions of Article 144 of the Constitution, which regards such law as part of Namibian law, and by that reason alone international law should be in contention every time a court is seized with a particular issue for consideration and decision. Instead, we

81 1993 NR 328 (SC) at 333 H–I.

82 See Article 145(1), Namibian Constitution.

83 1993 NR 328 (SC) at 334 E.

84 1995 NR 175 (SC).

find that international law is considered selectively – and, in most cases, not at all. To this end, the court made the following statement in the *Kauesa* judgment: ⁸⁵

The right to freedom of speech is found in the constitutions of many countries. It is internationally recognised. Many courts in many lands have interpreted human rights provisions pertaining to the right of freedom of speech. Both Mr Smuts and Mr Gauntlett invited us, in order to derive some assistance in the interpretation of Article 21(1)(a) and (2) of the Namibian Constitution to have regard to the interpretation of similar provisions in international human rights instruments and their national constitutions.

Regulation 58(32) of the Police Act,⁸⁶ which inhibited members of the police force from “commenting unfavourably in public upon the administration of the force”, was declared unconstitutional in that it was inconsistent with Articles 21(1) and (2) of the Constitution.

It is also notable that courts are more often inclined to refer to decisions of other jurisdictions such as Canada, India, South Africa, the United Kingdom, the United States of America, Zimbabwe and, on occasion, the European Court of Human Rights, rather than directly applying a provision from a treaty or convention of international law. This may very well be because decisions of other jurisdictions often have only persuasive value. Moreover, decisions of other jurisdictions can be distinguished from a domestic case, depending on the nature of the problem the municipal court is dealing with, and the similarity of the provision in question in regard to the one in the Namibian Constitution. Thus, the application of decisions of other jurisdictions becomes subject to the discretion of the court.

Given the manner in which international law and its treaty bodies operate, once a state ratifies and agrees to be bound by treaty body decisions, their disregard for such decisions will be frowned upon. In other words, it is expected that states would comply with a decision of a treaty body such as the Human Rights Committee. In light of Article 144 of the Namibian Constitution, one would have hoped that courts would spend time perusing the jurisprudence of this Committee in order to determine its views on, for instance, freedom of speech and expression, the limitations thereto, and the obligations Namibia has undertaken in this regard. Whilst one does not want to be restrictive in the understanding of what Article 144 envisaged, over the past 20 years courts have not been entirely alive to what is expected of them within the confines of this provision.

Müller v President of the Republic of Namibia & Another⁸⁷

The *Müller* case, although it referred to international law and quoted the jurisprudence of other countries, made a decision in favour of the status quo. In this regard, the court noted that the legal provision in question –⁸⁸

85 (ibid.:187 G–H).

86 No. 19 of 1990, published under Government Notice R 203, *Government Gazette* 791 of 14 February 1964.

87 1999 NR 190 (SC).

88 See Hubbard (2007:88); see also 1999 NR 190 (SC) at 204 B–E.

... the Aliens Act⁸⁹ gave effect to a tradition of long standing in the Namibian community that the wife normally assumes the surname of the husband. In this regard, there is also the uncontested evidence of Mr Tsheehama that he is not aware of any other husband in Namibia who wanted to assume the surname of his wife. What is more the appellant is not without a remedy.⁹⁰

After a submission by counsel in which he “also relied on certain conventions such as the CEDAW⁹¹ which was acceded to by the National Assembly”,⁹² the court shockingly expressed itself in the following terms: ⁹³

... such Conventions are of course subject to the Constitution and cannot change the situation.

It is clear from this case at least that international law plays second fiddle to traditional usage and custom. This view of the court was subsequently quashed by the Human Rights Committee. Later court decisions were more favourable towards the direct application of the ICCPR.

***Namunjepo & Others v Commanding Officer, Windhoek Prison & Another*⁹⁴**

In the *Namunjepo* case, the courts quite openly made reference to and applied international law. The court was faced with the question as to whether the use of leg irons and chains to restrain prisoners was an acceptable method of control of a human being. In its quest to answer this question, it was stated that “... the Court should also look at the situation in the international community”.⁹⁵

In this case the courts clearly applied their minds to what was found in other jurisdictions; but more importantly, courts expressed themselves quite directly on the position of international law instruments in the following terms:⁹⁶

Although instruments such as the Minimum Standard Rules have no legal standing its provisions are often relied upon as an interpretive help in the application of domestic legislation concerning penal institutions.

They also added that –⁹⁷

89 No. 1 of 1937.

90 See 1999 NR (SC) at 204: “Section 9 of the Aliens Act provides a specific mechanism which would enable the appellant to fulfil his aim”. In other words, the husband just needs to comply with the formalities set out in section 9(1) and then he can adopt his wife’s surname.

91 Convention on the Elimination of All Forms of Discrimination against Women.

92 See Hubbard (2008) and 1999 NR 190 (SC)

93 1999 NR 190 (SC) at 205 E.

94 1999 NR 271 (SC).

95 (ibid.:283 I).

96 (ibid.:284 E–F).

97 (ibid.:H).

[t]herefore the accession of Parliament to both the Convention against Torture and other Cruel[,] Inhuman or Degrading Treatment or Punishment (“CAT”) and the International [Covenant] on Civil and Political Rights (“ICCPR”) on 28 November 1994 is significant. Both these instruments contain provisions similar to our Article 8 and Article 10.1 of the ICCPR provides specifically that “[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

There is no doubt from the following statement by the courts that they did in fact take the expressions of the international community on this point into consideration:⁹⁸

The acceptance by Parliament of these Conventions as well as the First Optional Protocol to the ICCPR is a continued expression of and confirmation of the high norms and values of the Namibian people as contained in the Constitution and expressed by other institutions. When the Court must now make its value judgment it can also not ignore previous expressions in those judgements which were based on those very norms, sensitivities and aspirations and as a result of which certain constitutional principles were articulated.

In this expression lies the commitment and pact Namibia made with the international community: a commitment to articulate values that are informed by the principles of human rights, humanity, justice and peace – principles that are similar in scope and content with those the international community cherishes.

***Ex parte Attorney General: In Re Corporal Punishment by Organs of State*⁹⁹**

This case is a hallmark of Namibia’s constitutional jurisprudence. Despite being one of the first to be decided after Independence, the decisions of this case are very progressive in the application of international law to domestic problems, which is quite commendable. Thus, some of the decisions enunciated above, which occurred later than this decision, are a retrogression. The extract below is quite telling, in that it shows what is meant by the *progressive* v the *retrogressive* development of our jurisprudence through the use of interpretive tools.

The legal question in this case was whether a particular form of punishment authorised by law could properly be said to be inhuman or degrading. In order to answer this question, the court took an approach that involved a value judgment, as opposed to a textual or literal interpretation of the law. Consequently, the court had to take account of what the position would have been under an apartheid system that had no regard for the international human rights law, on the one hand, and what it would be in an independent Namibia that had joined the international community and had adopted a culture of human rights promotion and protection on the other:¹⁰⁰

It is however a value judgement which requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the Namibian people as expressed in its national institutions and its Constitution, and further

98 (ibid.:285 C–D).

99 1991 NR 178 (SC).

100 (ibid.:188 D–G).

having regard to the emerging consensus of values in the civilised international community (of which Namibia is a part) which Namibians share. This is not a static exercise. It is a continually evolving dynamic. What may have been acceptable as a just form of punishment some decades ago may appear to be manifestly inhuman or degrading today. Yesterday's orthodoxy might appear to be today's heresy.

The provisions of art 8(2) of the Namibian Constitution are not peculiar to Namibia; they articulate a temper throughout the civilised world which has manifested itself consciously since the Second World War.

The court further stated that "there is strong support for the view that the imposition of corporal punishment on adults by organs of State is indeed inhuman and degrading".¹⁰¹

This case seems not only to have referred to international law and jurisprudence of other jurisdictions quite extensively, but also applied them in its decision. Although this is palatable, it attracted some caution from Berker CJ (as he then was), when he reminded the court in his general comments that, whilst it was useful and instructive to refer to decisions of other courts (including the International Court of Human Rights), –¹⁰²

... the one major and basic consideration in arriving at a decision involves an inquiry into the generally held norms, approaches, moral standards, aspirations and a host of other established beliefs of the Namibian people.

Evidently, this appears to be the approach most courts took after 1991. The question, of course, is whether this is necessarily the correct approach – given our position as stipulated in Article 144. It is also a known fact that Parliament has not actually exercised its legislative power to contract itself out of a treaty that was negotiated and signed by the President (this may very well be because "decisions are taken in Cabinet and not in Parliament"¹⁰³). This means that, at least for the moment, Namibia is liable to comply with and consider as part of its law, at domestic level, all the international treaties that it has signed, ratified and acceded to, as well as all those treaties that are binding on Namibia by virtue of customary international norms and practices.

***Government of the Republic of Namibia & Others v Mwilima & Others*¹⁰⁴**

The *Mwilima* decision is a good example of how the courts should interpret and apply the meaning of Article 144. This is a Supreme Court decision that is binding on all other courts of Namibia.¹⁰⁵ Given Namibia's doctrines of stare decisis and judicial precedent,

101 (ibid.:H–I).

102 (ibid.:197 G–H).

103 See *The Namibian*, 16 April 2010, p 6: Speaking about his office, the Prime Minister responded to the question as to why the Head of State in Namibia does not sit in Parliament to participate in debates.

104 See <http://www.saflii.org/na/cases/NASC/2002/8.html>; last accessed 30 October 2009.

105 See Article 81, Namibian Constitution.

this ruling will become an established practice that should be considered each time a similar decision has to be made, particularly with reference to the interrelated nature of rights and the application of international law. In this case, the Supreme Court quite surprisingly accepted the submission that, in the event the domestic legislation does not make provision for a positive obligation on the state to afford better protection to the citizen, then due regard and application should be had to international instruments – in this instance the ICCPR.

With the establishment of the UN in 1948 and the subsequent adoption of the Universal Declaration of Human Rights, the object and purpose was to create an environment in which people felt protected against violations. A decision such as the one in *Mwilima* should be seen as a contribution to making the world a better place. In other words, the various nation states do not simply enter into these agreements without making sure they bring change to the conditions and situations of people back home. In this regard, the peoples of the UN, who, when they adopted the UN Charter, were determined to –¹⁰⁶

... establish conditions under which justice and respect for the obligations arising from the treaties and other sources of international law can be maintained.

Conclusion

It is clear from the above that Article 144 still creates uncertainty regarding the status of international law in this country. Some will argue this need not be, as both the contextual and literal interpretation of this provision does not allow for any understanding other than the fact that international law is part of our legal system. On the surface, this may very well be the case. However, reference to national jurisprudence has shown, that in the majority of cases international law, still only plays a role as part of the court's interpretive tools. There is neither an established pattern of how it is applied nor sufficient prominence accorded to it. So much so that, even though there is a Supreme Court decision on how we can accord socio-economic rights the status of justiciable rights, it remains a sore point within the legal environment of Namibia. Parliamentarians still refer us to Article Articles 95 and 101, reducing these rights to mere aspirations and ideals with no legal force and effect.

In other examples we are now forced to provide enabling legislation to ensure effective enforcement of a particular international treaty. The current draft of the International Criminal Court is a case in point¹⁰⁷. Why do we still need additional legislation in order for us to have people prosecuted under the Rome Statute? In fact this statute and others like it, shows, that there are different ways in which states make international law applicable to the municipal set up. But even then the self-executing nature of international

106 See the Preamble and Article 2 of the UN Charter, which states “All members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the present Charter”.

107 There has been a Namibian draft of the Rome Statute Establishing the International Criminal Court Implementation Bill since 2006.

statutes such as the International Convention Against Torture, is not exempted from the requirement of creating enabling legislation so that it can benefit from the more effective municipal enforcement machinery. It is clear that the best way is to have a hybrid of the two approaches rather than insist on a monist system whose aspiration may be considered subject to different interpretations. And to this end, one could boldly call upon the Attorney General, to bring an application in the High or Supreme Court asking for a declaratory order that will provide us guidance on the meaning and effect of Article 144 in the real sense.

References

- Amoo, S. 2008. *An introduction to Namibian law: Materials and cases*. Windhoek: Macmillan Education Namibia.
- Aust, A. 2007. *Handbook of international law*. Cambridge: Cambridge University Press.
- Bangamwabo, FX. 2008. "The implementation of international regional human rights instruments in the Namibian legal framework". In Horn, N & A Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia.
- Bayefsky, AF. 2002. *How to complain to the UN human rights treaty system*. New York: Transnational Publishers.
- Brownlie, I. 2003. *Principles of public international law: The relation between municipal and international law*. New York: Oxford University Press.
- Evans, D. 2006. *International law* (Second Edition). Oxford: Oxford University Press.
- Horn, N. 2008. "International human rights norms and standards". In Horn, Nico & Anton Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia.
- Hubbard, Dianne. 2007. "Ideas about equality, gender, sexuality and the law". In LaFont, S & D Hubbard (Eds). *Unravelling taboos: Gender and sexuality in Namibia*. Windhoek: Legal Assistance Centre.
- Nakuta, J. 2008. "The justiciability of social, economic and cultural rights in Namibia and the role of non-governmental organisations". In Horn, Nico & Anton Bösl (Eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia.
- Naldi, GJ. 1995. *Constitutional rights in Namibia: A comparative analysis with international human rights*. Kenwyn: Juta.
- Tshosa, O. 2010. "The status of international law in Namibian national law: A critical appraisal of the constitutional strategy". *Namibia Law Journal*, 2(1):3–27.
- OHCHR/Office of the High Commissioner for Human Rights. 2002. *Human rights: A compilation of international instruments. Vol. 1: (First Part) Universal instruments*. New York/Geneva: United Nations.
- UN/United Nations. 1945. *Charter of the United Nations and Statute of the International Court of Justice*. New York: Department of Public Information, United Nations.
- Viljoen, F. 2007. *International human rights law in Africa*. New York: Oxford University Press.

- Vincent, R.J. 1986. *Human rights and international relations*. Cambridge: Cambridge University Press & Royal Institute of International Affairs.
- Volodin, V. 2008. *Human rights: Major international instruments – Status as at 31 May 2008*. Paris: United Nations Educational, Scientific and Cultural Organisation.